No. 15,698

United States Court of Appeals

For the Ninth Circuit

ARMIDA ALDRIDGE,
Appellant,

vs.

STATES MARINE CORPORATION OF DELAWARE, a Corporation,
Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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To the Honorable Walter L. Pope, Chief Judge, and William Healy and Frederick G. Hamley, Circuit Judges:

Appellee States Marine Corporation of Delaware hereby petitions for a rehearing upon the Judgment of Reversal rendered herein on March 16, 1959.

GROUNDS FOR THE PETITION.

I

THE RIGHTS OF THE PARTIES IN THIS CASE SHOULD HAVE BEEN DETERMINED UNDER CALIFORNIA LAW.

This Court has now held that the sufficiency of the complaint must be judged in the light of maritime law and that the law of California does not govern the effect of the decedent's contributory negligence. As we read

the cases decided by the United States Supreme Court on February 24, 1959, this holding was wrong.

In *M/V Tungus v. Skovgaard* (1959) 359 U.S....., 3 L. Ed. 2d 524, the Supreme Court reviewed a case arising under the New Jersey Wrongful Death Act for the purpose of considering "the relationship of maritime and local law in cases of this kind." The respondent was there urging that in all such cases the maritime law should govern the substantive rights of the parties in order to insure uniformity of result. In rejecting this argument the Court pointed out that there is no "maritime law" in death cases; it held that where an action is brought under a state wrongful death statute the rights of the parties depend *entirely* upon that statute. It said (3 L. Ed. 2d at 528, 529):

> "The decisions of this Court long ago established that when admiralty adopts a State's right of action for wrongful death, it must enforce the right as an integrated whole, with whatever conditions and limitations the creating State has attached. That is what was decided in The Harrisburg, where the Court's language was unmistakable: '. . . [I]f the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. . . . The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right.' 119 U.S. 199, at 214. That is the doctrine which has been reiterated by the Court through the years. See The Hamilton, 207 U.S. 398; La Bourgogne, 210 U.S. 95; Western Fuel Co. v. Garcia, 257 U.S. 233; Levinson v. Deupree, 345 U.S. 648; cf. Just v. Chambers, 312 U.S. 383.

" 'Admiralty courts when invoked to protect rights rooted in state law endeavor to determine the issues in accordance with the substantive law of the state.' Garrett v. Moore-McCormack Co., 317 U.S. 239, 245. The policy expressed by a State Legislature in enacting a wrongful death statute is not merely that death shall give rise to a right of recovery, nor even that tortious conduct resulting in death shall be actionable, but that damages shall be recoverable when conduct of a particular kind results in death. It is incumbent upon a court enforcing that policy to enforce it all; it may not pick or choose.

* * *

"There is no merit to the contention that application of state law to determine rights arising from death in state territorial waters is destructive of the uniformity of federal maritime law. Even Southern Pacific v. Jensen, which fathered the 'uniformity' concept, recognized that uniformity is not offended by 'the right given to recover in death cases.' 244 U.S. 205 at 216. It would be an anomaly to hold that a state may create a right of action for death, but that it may not determine the circumstances under which that right exists. The power of a State to create such a right includes of necessity the power to determine when recovery shall be permitted and when it shall not. cf. Caldarola v. Eckert, 332 U.S. 155.

"We hold, therefore, that the Court of Appeals was correct in viewing the basic question before it as one of interpretation of the law of New Jersey."

The principle that the needs of a uniform federal maritime law are not offended by the enforcement of rights and liabilities under state law in wrongful death actions was likewise recognized by the Supreme Court in *Romero v. International Term. Operat. Co.* (1959) 359 U.S. ....,

3 L. Ed. 2d 368. The Court there held that claims under the general maritime law are not comprehended within the federal statute according jurisdiction to the District Courts of suits arising under the Constitution or laws of the United States, and referred to the claim that all enforced rights pertaining to matters maritime are rooted in federal law as "a destructive over-simplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce." (3 L. Ed. 2d at 382). The Court made express reference to the fact that "Congress was careful to make the Death on the High Seas Act applicable only outside state territorial waters so as not to intrude on state legislative competence." (3 L. Ed. 2d at 384 n. 42).

Clearly the language of the Supreme Court in the *Tungus* and *Romero* cases establishes that actions under state wrongful death statutes do not stand upon the same footing as do other maritime tort actions. It is equally clear that the Supreme Court has included contributory negligence as a matter to be determined by the state law. In the *Tungus* case the Supreme Court was faced with an absence of any authoritative ruling from the courts of New Jersey and it thus did not disturb a doubtful prediction that the New Jersey statute encompassed a claim for unseaworthiness. The Court emphasized, however, that it was incumbent upon the federal courts to enforce any state wrongful death statute in accordance with the terms of that statute and the decisions rendered under it as a matter of state law.

Our argument that the effect of Aldridge's contributory negligence must be governed by the law of California was

precisely what the Supreme Court has now ruled. We must necessarily take exception to this Court's application of the maritime rule of comparative negligence on the basis of *Pope & Talbot, Inc. v. Hawn* (1953) 346 U.S. 406, or *Kermarec v. Transatlantique* (1959) 359 U.S. ....., 3 L. Ed. 2d 550, inasmuch as neither of these cases involved an action under a state wrongful death statute. It has now been settled by the Supreme Court that the results in these maritime personal injury actions have no bearing here.

We must also take exception to this Court's reliance upon *United N.Y. & N.J. S.H. Pilots Asso. v. Halecki* (1959) 359 U.S. ....., 3 L. Ed. 2d 541. Although the Supreme Court's reversal in that case was not directed to the negligence aspects of a decision of the Court of Appeals (*Halecki v. United New York & New Jersey S.H.P. Ass'n.* (2 Cir. 1958) 251 F. 2d 708), the only negligence point mentioned by the Supreme Court concerned the matter of duties owing by a shipowner to a business guest; it did not deal with the question of contributory negligence. To the extent that this Court has adopted the reasoning of the Court of Appeals for the Second Circuit in engrafting onto a state wrongful death statute the maritime rule of comparative negligence "so as to avoid capricious and irrational distinctions" (251 F. 2d at 713), it has failed to make the necessary distinction between injury and death cases. It is now firmly established that this Court must apply the law of California to determine the effect of the decedent's contributory negligence notwithstanding such application will produce a different result than that in an injury case.

A broad interpretation of the California statute "as taking over as a part of the model it accepted the exemption of contributory negligence as a bar" was not in accordance with the decisions of this State. The California Supreme Court has spoken authoritatively on the subject and it is incumbent upon this Court to follow the California decisions. We respectfully submit that we are thus entitled to a correction of the Opinion of March 16, 1959, and that under a proper application of the California law the ruling of the court below was correct.

II

THE COMPLAINT FAILED TO STATE A CAUSE OF ACTION UNDER CALIFORNIA LAW, AND THIS COURT SHOULD HAVE SO HELD.

It is settled law in California that the contributory negligence of a decedent bars any recovery by his heirs or personal representatives under the California wrongful death statute. We urged this point in our Brief and we wish to avoid repetition. We do, however, feel it essential to place before this Court the authoritative pronouncements of the California courts which negate any interpretation of § 377 of the Code of Civil Procedure as incorporating the maritime rule of comparative negligence.

Buckley v. Chadwick (1955) 45 Cal. 2d 183, 288 P. 2d 12, is the leading California case. Prior to that decision the California cases had, since 1862 when California's original wrongful death statute was enacted in light of the English decisions under Lord Campbell's Act, "consistently and unswervingly followed the rule . . . that contributory negligence on the part of the decedent bars recovery in

wrongful death actions." (288 P. 2d at 21). In the *Buckley* case the plaintiffs challenged the validity of these prior decisions on the ground that a Los Angeles Superior Court judge had recently suggested they were wrong. See Nourse, *"Is Contributory Negligence of Deceased a Defense to a Wrongful Death Action?"* 42 Cal. L. Rev. 310 (1954). For this reason the California Supreme Court made an extensive analysis of the origin, development and acceptance of the rule recognizing contributory negligence of the decedent as a defense in wrongful death actions in this State.

The California Supreme Court pointed out that the defense of contributory negligence was firmly established when California first enacted the progenitor of § 377 of the Code of Civil Procedure. It then noted that although § 377 has been amended three times, contributory negligence was never abolished as a defense. It concluded (288 P. 2d at 22):

> "Under the circumstances which have been related it must be recognized that until the Legislature sees fit to provide otherwise the rule is established in this State that in wrongful death actions contributory negligence on the part of the deceased is defensive matter and, when shown, will bar recovery."

The *Buckley* case establishes conclusively that the defense of contributory negligence is an integral part of the California wrongful death statute. Both the Supreme Court and the Congress of the United States have expressed "deep concern" that the power of the States to create wrongful death actions with such defenses not be affected by federal law. See *M/V Tungus v. Skovgaard,*

supra, at 3 L. Ed. 2d 529. Indeed, there is no federal law in cases of this kind to which the State courts could look even if state law were not competent to determine the rights created by it. This "void" can be filled only by the state law which this Court is bound to apply in its entirety.

We have disagreed with this Court's statement that "The sufficiency of the complaint must be judged in the light of maritime law." We cannot overemphasize it: *The Supreme Court has placed wrongful death actions on an etirely different basis than other maritime tort actions, and has required the federal courts to choose and apply all of the state law in actions arising under state wrongful death statutes.* Part of the law of California which this Court must apply is the defense of contributory negligence. An equally important part of California law is the rule that contributory negligence can exist as a matter of law, and that a complaint which discloses that harm occurred as the result of an obvious danger fails to state a cause of action.

In *Powers v. Raymond* (1925) 197 Cal. 126, 239 Pac. 1069, the plaintiff was injured by falling on an unlighted pathway leading from the defendant's hotel to a railroad station. A well lighted roadway was available for the plaintiff's use, but she voluntarily chose to enter the dark pathway. The California Supreme Court ruled that even though there may have been negligence on the part of the defendant, the conclusion was impelled that the plaintiff was guilty of contributory negligence as a matter of law. In response to the plaintiff's assertion that it was the duty of the defendant to place some sign or obstruction

at the entrance of the dark path to warn those who might choose to enter, the court held that the darkness was in itself a sufficient warning not to use the path.

Cole v. Rush (1955) 45 C. 2d 345, 289 P. 2d 450, involved facts quite analogous to those alleged here. The widow and minor children of a saloon patron who was killed in a fight brought a wrongful death action against the saloon keepers. The material allegations of the complaint were that the defendants, with knowledge of the decedent's belligerent proclivities when intoxicated and notwithstanding numerous prior requests by the plaintiff widow not to do so, negligently furnished intoxicating liquor to the deceased; that because the defendants so allowed the decedent to become intoxicated he became belligerent and engaged in fisticuffs, thereby sustaining fatal injuries. The trial court sustained a demurrer without leave to amend, and the Supreme Court affirmed. It held that the complaint did not state facts sufficient to constitute a cause of action inasmuch as it showed on its face that the decedent's injuries were caused or contributed to by his own fault and negligence.

In *Shanley v. American Olive Co.* (1921) 185 Cal. 552, 197 Pac. 793, the plaintiff alleged that the defendant had constructed a building so close to its spur track that the side ladder of a freight car would clear it only by a few inches, and that plaintiff, a railway switchman, was crushed in an attempt to climb the ladder while the car was moving past the building. On the plaintiff's appeal from an order granting the defendant's motion for judgment on the pleadings the Supreme Court of California affirmed. The Court said (197 Pac. at 794):

"From the facts alleged it appears that the plaintiff, as a member of the crew switching the car, was invited by the defendant to enter its premises for the purpose of switching said car to the spur. . . . If there is a danger attending upon such entry, or upon the work which the person invited is to do thereon, and such danger arises from causes or conditions not readily apparent to the eye, it is the duty of the owner to give such person reasonable notice or warning of such danger. But such owner is entitled to assume that such invitee will perceive that which would be obvious to him upon the ordinary use of his own senses. He is not required to give to the invitee notice or warning of an obvious danger."

In *Hauser v. Pac. G. & E. Co.* (1933) 133 Cal. App. 222, 23 P. 2d 1068, the plaintiff appealed from an order granting the defendant's motion for judgment on the pleadings and denying the plaintiff's motion to file an amended complaint. The complaint showed that the plaintiff, with knowledge of the location of high tension wires, deliberately drove his derrick close enough to cause electricity to arc across the space. Although the complaint further alleged that the accident was caused solely by the negligence of the defendant in maintaining the power line, the Court said (23 P. 2d at 1070, 1071):

"From the complaint it appears that plaintiff knew of the dangerous character of the wires and their exact location and condition, and deliberately moved a derrick into them and was injured. From the foregoing, it appears the complaint and the amended complaint failed to set forth any cause of action.

* * *

"Although permission to amend pleadings is a matter within the sound discretion of the trial court,

courts should be liberal in the allowance of amendments, but as here, where a cause of action is not stated and it is apparent from the facts alleged a cause of action cannot by amendment be stated, there is no abuse in refusing to grant the amendment."

Royal Ins. Co. v. Mazzei (1942) 50 Cal. App. 2d 549, 123 P. 2d 586 involved facts similar to those in the *Hauser* case. The court affirmed a judgment of dismissal entered in favor of a defendant after his demurrer was sustained without leave to amend. The court noted that the complaint affirmatively showed that the accident was caused by a danger that would have been obvious in the exercise of ordinary care, and that the defendant was not required to give to his invitee notice or warning of the obvious danger.

It is clear that the District Court's order of dismissal in this case would have been affirmed under a proper application of the California law. The "consistent and unswerving" adherence by the California courts to the defense of contributory negligence in wrongful death actions, the settled rule that a complaint showing that harm resulted from obvious dangers fails to state a cause of action, and the presumption under California law against the pleader and in favor of the judgment of dismissal where, as here, the plaintiff has at no time suggested additional facts to support another amendment (see the *Hauser* and *Mazzei* cases, supra), all clearly set forth the state law which this Court is obliged to follow. The "risky procedures" which this Court recognized as affirmatively appearing on the complaint cannot be avoided by viewing the sufficiency of the complaint in the light of

maritime law. State law must be applied, and on this basis we now petition this Court to vacate its judgment of reversal and reinstate the order of the court below.

III

THIS CASE DOES NOT INVOLVE UNSEAWORTHINESS, AND THE SUGGESTIONS TO THE CONTRARY SHOULD BE STRICKEN FROM THE OPINION.

We respectfully petition for a rehearing on that portion of this Court's opinion which suggests that the appellant's complaint might be amended or altered at pretrial to include a cause of action for unseaworthiness. This matter was neither briefed by the parties nor argued before this Court; we request the opportunity to be heard for the first time on an issue which could materially affect the rights of the parties if this case is to be remanded for trial.

A divided court in *Skovgaard v. The M/V Tungus* (3 Cir. 1957) 252 F. 2d 14 construed the New Jersey Wrongful Death Act to include a cause of action for unseaworthiness. This interpretation of the New Jersey law was a "seriously doubtful" one which the Supreme Court itself characterized as "a prediction that might tomorrow be proved wrong by the courts of New Jersey." *M/V Tungus v. Skovgaard* (1959) 359 U.S. ....., 3 L. Ed. 2d 524, 530. Moreover, there are important differences in wording between the New Jersey and California statutes which in themselves preclude any reliance upon the *Skovgaard* interpretation for the California law. The New Jersey Act (N.J.S.A. 2A: 31-1) refers, among other things, to a

"default such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury." The California statute is limited solely to deaths caused by "wrongful act or neglect."

This Court has previously recognized that § 377 of the California Code of Civil Procedure does not encompass causes of action for the breach of what is essentially a contractual duty, and that a libel under the California wrongful death statute based upon a shipowner's alleged failure to furnish maintenance and cure does not state a cause of action. *Willey v. Alaska Packers' Ass'n.* (N.D. Cal. 1926) 9 F. 2d 937, affirmed (9 Cir. 1927) 18 F. 2d 8. It is manifest that the doctrine of unseaworthiness, a non-fault basis of liability which has developed under the theory of implied warranty existing by reason of the relationship between seaman and vessel, must be considered in the same light as the shipowner's liability for maintenance and cure. Indeed, it has been squarely held that the California wrongful death statute does not support a cause of action for unseaworthiness. *Mortenson v. Pacific Far East Line* (N.D. Cal. 1956) 148 F. Supp. 71.

The California Supreme Court has made it clear that wrongful death actions in this State are to be governed by a construction of the California statute in light of the English decisions under Lord Campbell's Act. *Buckley v. Chadwick* (1955) 45 Cal. 2d 183, 288 P. 2d 12; *Cole v. Rush* (1955) 45 C. 2d 234, 289 P. 2d 450, 456. Historically, neither the common law nor any of the decisions under Lord Campbell's Act used the circumstance of unseaworthiness as a basis of imposing liability for non-negli-

gent personal injury. See *Skovgaard v. The M/V Tungus* (3 Cir. 1957) 252 F. 2d 14, 20 (dissenting opinion). Inasmuch as the California courts have clearly expressed an intention to view § 377 as adopting without change the settled construction of its English model, an interpretation of the California statute as borrowing what is to it the novel maritime concept of unseaworthiness is unwarranted.

Finally, we ask this Court to withdraw its comments pertaining to unseaworthiness on the ground that the facts alleged in neither the original nor the amended complaint would support such a cause of action even if it were permitted under state law. The suggestion of a cause of action for unseaworthiness in a case devoid of any allegations of defects in a vessel's gear, equipment or machinery —and indeed in a case where the only charging allegations pertain to the manner in which work has been performed —can only add hopeless confusion to an already misunderstood and misapplied doctrine. There is no basis for a cause of action for unseaworthiness under the facts here alleged; the Appellant withdrew that count voluntarily in the court below. We ask this Court to eliminate its references to the question of unseaworthiness and thereby withdraw the cloud which it has placed over the procedural steps heretofore taken in good faith to eliminate issues not involved.

IV

IT WAS ERROR FOR THIS COURT TO VIEW THE HALECKI CASE AS SUPPORTING A CAUSE OF ACTION FOR NEGLIGENCE UNDER THE FACTS ALLEGED IN THE COMPLAINT.

The Opinion in this case was based almost entirely upon the decision in *Halecki v. United New York & New Jersey S.H.P. Ass'n.* (3 Cir. 1958) 251 F. 2d 708, reversed (1959) 359 U.S. ....., 3 L. Ed. 2d 541. In support of its position this Court relies upon the fact that the Supreme Court's reversal of *Halecki* was not based upon the negligence questions there involved. Under the circumstances we are impelled to ask for a rehearing on the ground that the negligence aspects of the *Halecki* case have not been fully presented to this Court, nor were they so presented to the United States Supreme Court. (See brief for the Petitioner, pp. 56-60, *United N.Y. & N.J. S.H. Pilots Asso. v. Halecki* (1959) 359 U.S. ....., 3 L. Ed. 2d 541).

Except insofar as it may be distinguished along the lines suggested below, we strongly disagree with the *Halecki* case as decided by the Court of Appeals for the Second Circuit and we believe that the reasons for our disagreement are valid. That case involved harm to a person resulting from risks inherent in the work he was performing as an employee of an independent contractor. In supporting a cause of action for alleged negligence the Court of Appeals quoted a rule of law which in fact should not have applied to the situation there presented. As so misapplied an otherwise sensible rule of law has now been made to stand for the startling proposition that a shipowner can be liable for the dangerous work methods selected by employees of an independent contractor over whom he has no control.

The rule of law in question is set forth in the Restatement of Torts, Section 344. It requires the possessor of land to exercise reasonable care to minimize the risks created by an independent contractor working on his premises so that *other persons* lawfully entering thereon may not be harmed. As so stated and properly applied there is nothing new about the rule. But this rule was not intended nor should it apply to make the owner of premises liable for harm to the very person who creates the danger of which he complains. This is precisely what the Restatement of Torts itself provides in Section 340, which states that "A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein."

The ruling in the *Halecki* case can be justified only by viewing the decedent there as a *third person* lawfully entering the premises, and the dangerous condition, i.e. inadequate ventilation, as being something over which he had no control. To this extent the shipowner might properly have been held responsible either on the theory that it should have provided adequate ventilation itself or that it was responsible for seeing that the concessionaire in charge of this phase of work on its vessel did so. But if the *Halecki* case was intended to establish liability on the part of a shipowner in a situation where, as here, the danger is both known to and created by the person injured we cannot abide it. We likewise do not believe that this was the Supreme Court's intention.

We urge that the proper rule to be applied to the facts here alleged was announced in *Filipek v. Moore-McCormack Lines* (2 Cir. 1958) 258 F. 2d 734, cert. denied (1959) 3 L. Ed. 2d 629. The court there recognized that even under the liberal doctrines of the general maritime law a shipowner could not be held responsible to protect an employee of an independent contractor from the risks inherent in and created by the very work which he was performing on the vessel.

Whatever was said by either the Court of Appeals or the Supreme Court on the negligence question involved in *Halecki* cannot be viewed as anything greater than an expression of New Jersey state law. The Supreme Court made this much clear when in *M/V Tungus v. Skovgaard* (1959) 359 U.S. ....., 3 L. Ed. 2d 524, it held that actions brought under a state wrongful death statute are to be governed entirely by state law. This case is to be governed neither by the laws of New Jersey nor the general maritime law. It is the California statute which this Court must apply, and for the reasons hereinabove stated the complaint did not state a cause of action cognizable under the laws of California.

CONCLUSION.

We believe that this Court failed to determine the rights of the parties in this case under state law as required by the United States Supreme Court. We also believe that the District Court's dismissal of the complaint was proper inasmuch as no cause of action was stated under Cali-

fornia law. Accordingly, we petition this Court as follows:

1. To vacate its Opinion and Judgment of Reversal dated March 16, 1959 and enter a judgment affirming the decision of the court below;

2. To withdraw from its Opinion of March 16, 1959 all references to "unseaworthiness" and to the general maritime law as controlling the substantive issues in this case; and

3. To grant a rehearing with oral argument upon the Opinion and Judgment of March 16, 1959 if the Court desires such argument for clarification of the issues presented herein.

Dated, San Francisco, California,
April 9, 1959.

Respectfully submitted,
GRAHAM, JAMES & ROLPH,
ROBERT E. PATMONT,
Attorneys for Appellee and Petitioner.

CERTIFICATE OF COUNSEL

I, Robert E. Patmont, hereby certify that I am counsel for the Appellee herein, that I prepared the foregoing petition for rehearing, that it is in my judgment well founded, and that it is not interposed for delay.

Dated, San Francisco, California,
April 9, 1959.

ROBERT E. PATMONT,
Of Counsel for Appellee and Petitioner.